Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

OSCAR AVILA-SANCHEZ,

Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL,

Respondent.

On Petition for Writ of Certiorari
to the Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether the Executive Branch exceeded its authority in acting against Congressional intent and this Court's holding in *INS v. St. Cyr* when it validated unlawful retroactive applications of law, and, if so, whether such validation is *ultra vires* and a legal nullity.

B. Whether *St. Cyr* applies to cases on collateral review of deported Legal Permanent Residents with settled expectations whom the Attorney General unlawfully prohibited from applying for relief.

C. Whether this Court's decision in *Fong Haw Tan v. Phelan* limits the Executive Branch's interpretive authority, and, if so, whether its enacting regulations 8 C.F.R. § 1003.44(k) that extinguished settled expectations recognized by *St. Cyr* is *ultra vires* and a legal nullity.

D. Whether, in cases where the Executive Branch acted *ultra vires*, an alien adversely affected by such *ultra vires* acts suffers a due process violation where three separate administrative courts took simultaneous jurisdiction over the singular issue of an alien's deportability instead of deferring to each other and creating an orderly, unified process.

PARTIES

All parties appear on the front cover.

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Mr. Oscar Avila-Sanchez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

I. Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit for a Petition for Rehearing With Suggestion En Banc was denied on February 27, 2008. Appendix at Part A. The opinion of the United States Court is published at 509 F.3d 1037 (9th Cir. 2007) [case no. 06-70663] and dismissed on December 3, 2007. On January 23, 2006, the BIA denied Mr. Avila-Sanchez' Appeal. Appendix at Part B.

II. Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Ninth Circuit Court of Appeals invoked jurisdiction under INA § 242(a)(1) to review general orders of removal. The REAL ID Act § 106(a)(1)(A) expanded the scope of direct judicial review of final removal orders, including those involving criminal aliens, by explicitly providing for review of all constitutional and questions of law related thereto. *See* INA § 242(a)(2)(D); 8 U.S.C. § 1252(a)(2)(D) (as amended).

III. Constitutional Provisions, Statutes, and Regulations Involved

INA § 212(c); 8 U.S.C. § 1182(c):

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

8 C.F.R. § 1003.44(k):

> (k) Limitations on eligibility under this section. This section does not apply to: (1) Aliens who have departed the United States and are currently outside the United States; (2) Aliens issued a final order of deportation or removal who then illegally returned to the United States; or (3) Aliens who have not been admitted or paroled.

IV. Statement of the Case

This case concerns the Attorney General's promulgating regulations in 8 C.F.R. § 1003.44(k) that validate his decision in *Matter of Soriano*, 21 I&N Dec. 516 (BIA 1996) (finding INA § 212(c) retroactively repealed), despite the fact that this Court in *INS v. St. Cyr* found the *Soriano* interpretation not merely in error but outside of the Executive Branch's authority due to the common law tradition of a presumption against retroactive application of the laws absent clear Congressional intent. The Attorney General has issued regulations that recognize the *Soriano* decision as a valid change in the law prior to this Court's decision in *St. Cyr* against this Court's holding in *Rivers v. Roadway Express Inc.*, that misinterpretations of retroactivity do not change the law and that subsequent judicial interpretations of retroactivity merely decide what the law had always meant.

Mr. Avila-Sanchez is a forty-four-year-old native of Mexico who entered the United States in 1980 as a Lawful Permanent Resident [hereinafter LPR].

Mr. Avila-Sanchez's family in the United States consists of two United States Citizen children, parents, and siblings.

Mr. Avila-Sanchez's criminal record consists of several crimes: a 1989 California Penal Code § 273.5(a) (dom. viol.) with a two-day jail sentence; a 1993 California Health and Safety Code § 11350 (simple poss.) with a 180-day jail sentence that subsequently became a 16 month prison sentence after revocation of probation; a 1995 California Health and Safety Code § 11550 (under influence) with a 200 day jail sentence; a

2001 California Vehicle Code § 14601.1(a) (suspend driv. lic.); and a 2003 California Penal Code § 242 (simple battery) with 25 days jail.

On November 8 and 15, 1996, the INS issued and filed, respectively, an Order to Show Cause that instituted *deportation* proceedings under pre-IIRIRA laws. Mr. Avila-Sanchez applied for relief from deportation based on his LPR status under INA § 212(c).

On April 29, 1997, based on the Attorney General's implementing a policy of ignoring the principle of non-retroactivity of statutes absent clear congressional intent and in direct violation of Supreme Court precedent requiring construction of immigration statutes in favor of the alien, Immigration Judge Jack Weil in El Centro, California, pretermitted Mr. Avila-Sanchez's application for a waiver under INA § 212(c), stripped him of his LPR status, and ordered him deported.

On February 5, 1998, the BIA affirmed the Immigration Judge's order.

Prior to the REAL-ID Act, the Circuit Court's did not have jurisdiction to hear direct appeals of criminal aliens, and the INS deported Mr. Avila-Sanchez before his attorney could file a Writ of Habeas Corpus in Federal District Court. As a result, no judicial review of the merits of Mr. Avila-Sanchez's eligibility for a § 212(c) waiver took place prior to his deportation.

In July 1998, Mr. Avila-Sanchez resumed his residence in the United States.

On December 27, 1999, the Ninth Circuit, in *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999), narrowly corrected the Attorney General's retroactive

repeal of INA § 212(c) finding that Congress evidenced absolutely no intention to repeal the statute retroactively for persons who actually relied upon the availability of § 212(c) relief.

On June 25, 2001, this Court, in *INS v. St. Cyr*, 533 U.S. 289 (2001), broadly corrected the EOIR's clearly erroneous retroactive repeal of INA § 212(c), finding no evidence of intent to retroactively repeal § 212(c) and finding that aliens had a settled expectation of eligibility to apply for a waiver under that statute at the time they made criminal pleas.

On April 5, 2005, Mr. Avila-Sanchez pulled over when requested by local law enforcement on suspicion of driving under the influence. While no charges were filed, the DHS placed an immigration hold on him based on his prior immigration record.

On April 22, 2005, Mr. Avila-Sanchez filed a Special § 212(c) Motion to Reopen deportation proceedings with the BIA as a means to eventually bring his deportation proceedings to the Ninth Circuit for appellate review in light of this Court's *St. Cyr* decision. The Motion did not mention that Mr. Avila-Sanchez re-entered the United States illegally, because this Court's *St. Cyr* decision found that all LPR's who plead in reliance of § 212(c) relief eligibility had settled expectations—not just those aliens who were not yet deported—and because it appeared plainly obvious that the INS would have deported Mr. Avila-Sanchez rather than keep him in administrative detention for seven years on the dole of American taxpayers.

On April 29, 2005, the ICE issued an NTA and instigated *removal* proceedings under post-IIRIRA laws.

On June 2, 2005, Immigration Judge Nickerson, in Lancaster, California was unable to determine his jurisdiction due to the filing of the motion to reopen deportation proceedings, continued the case to allow the BIA to rule upon the pending§ 212(c) Motion.

On June 28, 2005, the Judge decided that he had jurisdiction over the April 29, 2005, NTA, and ordered Mr. Avila-Sanchez removed from the United States and denied him the opportunity to collaterally attack his prior deportation order based on erroneous retroactive application of the law prior to the Circuit Courts and this Court's finding that the statute clearly lacked any language evidencing an intent to retroactively repeal INA § 212(c).

On July 5, 2005, Mr. Avila-Sanchez filed an appeal with the BIA regarding the exercise of concurrent jurisdiction and failure to consolidate proceedings and the denial of eligibility for INA § 212(c) relief.

On July 7, 2005, the BIA, in a wholly unexpected move, granted Mr. Avila-Sanchez' Special § 212(c) Motion and remanded his *deportation* case to the Immigration Court.

On August 3, 2005, August 31, 2005, an unknown date, and October 12, 2005, Judge Weil violated *Purba v. INS*, 884 F.2d 516, 518 (9th Cir. 1989), by conducting *deportation* hearings in Mr. Avila-Sanchez's case with neither Mr. Avila-Sanchez nor his counsel present. The Record contains no evidence of the Immigration Judge asking the DHS to transfer Mr. Avila-Sanchez to El Centro, California from Lancaster, California.

On August 3, 2005, Judge Weil noted on the Notice of Hearing that "DHS file in Lancaster" showing that the Judge had knowledge of the Lancaster proceedings

and Mr. Avila-Sanchez's detention in Lancaster while the Judge conducted deportation proceedings in El Centro.

On August 8, 2005, Mr. Avila-Sanchez moved Judge Weil to change venue to the Lancaster EOIR where the ICE detained him and to consolidate all files before the Court at the site of administrative detention. The Motion to Change Venue did not contain any mention that Judge Nickerson had ordered Mr. Avila-Sanchez removed, because the removal order remained on appeal, had not become final, and appeared to have become moot given the reopening of deportation proceedings which, by operation of law, restored Mr. Avila-Sanchez's LPR status. Additionally, Mr. Avila-Sanchez could at least be physically present for proceedings in Lancaster as required for pre-IIRIRA deportation cases under INA § 242(b) (pre-April 1, 1997).

On August 11, 2005, Judge Weil failed to consolidate the Records of Proceedings in El Centro and Lancaster, failed to recognize Mr. Avila-Sanchez' Counsel of Record, found substantive and in personam jurisdiction over the Petitioner (whom the DHS had since April detained in Lancaster, not El Centro), and litigated in the DHS's stead by personally filing a motion to reconsider with the BIA to challenge the BIA's July 7, 2005, Special § 212(c) grant.

On September 28, 2005, Board Member Hess absurdly affirmed the Removal Order of Judge Nickerson and ignored Mr. Avila-Sanchez' request to consolidate these cases into one unified proceeding. As a result of Hess' affirming the removal order without careful review of the Record, Mr. Avila-Sanchez on this

date had a BIA-affirmed *removal* order from his case in Lancaster, a BIA order granting his Special § 212(c) Motion to Reopen *deportation* proceedings, and a *deportation* hearing scheduled before Judge Weil in El Centro on October 12, 2005, at 1:00 pm, which Judge Weil also scheduled on September 28, 2005.

On October 6, 2005, Mr. Avila-Sanchez filed a Motion to Reconsider to reconsider the insanity of having three different offices of the EOIR exercise concurrent jurisdiction over Mr. Avila-Sanchez's deportability, as there existed no way to explain to the deportation officers who actually have to execute the law at the end of the day the contradictory legal posture of this case.

Over the proceeding months, the DHS filed and served numerous documents once its Counsel took the time to read Mr. Avila-Sanchez's arguments and realize the chaos that concurrent jurisdiction caused.

On January 23, 2006, the BIA issued two decisions: one decision denied Mr. Avila-Sanchez's motion to reconsider its affirmation of the removal order and the other decision overturning the BIA's own grant of the Special § 212(c) motion to reopen deportation proceedings.

On February 3, 2006, Mr. Avila-Sanchez filed his Petition for Review before the Ninth Circuit.

On March 17, 2007, the BIA held in *Matter of W-C-B-*, 24 I&N Dec. 118 (BIA 2007), that Immigration Judges, in Judge Nickerson's circumstances with Mr. Avila, do not even have jurisdiction over the removal proceedings where a person re-entered after a prior deportation.

On December 3, 2007, this Court denied in a published decision Mr. Avila-Sanchez' Petition for Review without ruling on the core issue raised on appeal of whether the Attorney General acted beyond his interpretative authority by ignoring the common law tradition of a presumption against retroactive application of laws. Absent a finding on this issue, as acknowledged in Ninth Circuit briefs, Mr. Avila-Sanchez has no case if the Attorney General had the interpretive authority to ignore the text of the law, precedent, and, most importantly, tradition older that our Republic when retroactivity concerns are at issue. However, if the laws do check the authority of the Executive branch, then Mr. Avila-Sanchez and many tens-of-thousands of LPR's similarly situated, illegally had their status stripped and deserve a chance to exercise their settled expectations and apply for relief under INA § 212(c).

On January 16, 2008, Mr. Avila-Sanchez filed a Petition for Rehearing with suggestion for en banc review, because the Ninth Circuit did not address the central issue in this case of the Executive Branch's authority to validate its misinterpretation to deny 212(c) relief where *St. Cyr* held that Mr. Avila had a settled expectation of the availability of relief at the time that he plead.

On February 27, 2008, the Ninth Circuit denied the Petition for Rehearing.

V. Reasons for Allowance of the Writ

A. The Executive Branch Exceeded Its Authority in Acting Against Congressional Intent and this Court's Holding in St. Cyr when It Validated Unlawful Retroactive Applications of Law, Making Such Validation Ultra Vires and a Legal Nullity.

The EOIR relied upon the legitimacy of *Matter of Soriano*, 21 I&N Dec. 516 (BIA 1996) and 8 C.F.R. § 1003.44(k) to find Mr. Avila-Sanchez ineligible to exercise his settled expectation to apply for a waiver under INA § 212(c) during both his deportation proceeding in 1998 and his reopened deportation and removal proceedings in 2005-06.

Mr. Avila-Sanchez herein challenges the Executive Branch's authority to retroactively apply legislation without a clear Congressional delegation to do so.

Justice Scalia has held that "[t]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *INS v. St. Cyr*, 533 U.S. 289, 316 (2001) (quoting Justice Scalia in *Kaiser*).

The interpretive deference given under *Chevron* to the Executive Branch interpretations does not extend to interpretations that squarely conflict with Congressional intent and breach established doctrines of Legislative interpretation. "*Chevron* deference is predicated on the assumption that a statute's ambiguity constitutes an 'implicit delegation' to the agency to interpret the statute." *Castro-Cortez v. INS*, 239 F.3d 1037, 1053 (9th Cir. 2001) (citing *Food & Drug*

Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

Since the presumption against retroactive legislation constitutes an established doctrine of legislative interpretation. Courts may give no deference to the Executive Branch's violation of the presumption, unless Congress explicitly mandates retroactive application to rebut the presumption.

"The executive has no inherent power over immigration and must stay within the grant of authority defined by statutes enacted by Congress." David Weissbrodt & Laura Danielson, IMMIGRATION LAW AND PROCEDURE § 2-3.3 at 81 (2005). The Executive Branch and its agencies have the primary function of enforcing the legislation passed by Congress. Any unauthorized Executive decisions are illegal, and the Judicial Branch may overturn such Executive actions. *Mahler v. Eby*, 264 U.S. 32, 45 (1924).

The concept of overturning illegal Executive decisions has its roots in the Constitutional separation of powers doctrine. Applying that doctrine in *INS v. Chadha*, 462 U.S. 919 (1983), this Court overturned an illegal legislative veto provision that infringed upon Executive Branch powers. Similarly, Executive actions that infringe upon Legislative Branch powers may not stand. In Mr. Avila-Sanchez's case, retroactive interpretation absent Congressional intent constitutes an violation of separation of powers.

Given the presumption against retroactive application as decided by *St. Cyr* and the lack of implicit delegation when it comes to retroactivity determinations, the Attorney General's retroactive

interpretation in *Matter of Soriano* is *ultra vires*, and beyond his interpretive authority.

On February 21, 1997, four years prior to *St. Cyr*, the Attorney General applied the *Matter of Soriano* decision holding that INA § 212(c) relief no longer remained available after those enactments This Court granted certiorari on account that "[t]he courts of appeals ... reached varying conclusions about the temporal scope of AEDPA section 440(d)" as it related to retroactive application of the statute to those persons who had entered plea agreements expecting to bring forward their cases on the merits of 212(c) relief. *INS v. St. Cyr*, 533 U.S. 289 (2001), *petition for writ of cert.* (November 2000) (No. 00767). In 2001, all but one of the U.S. Circuit courts of Appeal that reviewed *Matter of Soriano* found that it impermissibly applied AEDPA retroactively. *See Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998), *cert. denied* 526 U.S. 1004 (1999); *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999); *Sandoval v. INS*, 166 F.3d 225 (3d Cir. 1999); *Tasios v. Reno*, 204 F.3d 544 (4th Cir. 2000); *Pak v. Reno*, 196 F.3d 666 (6th Cir. 1999); *Shah v. Reno*, 184 F.3d 719 (8th Cir. 1999); *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999); and *Mayers v. INS*, 175 F.3d 1289 (11th Cir. 1999). Only the Seventh Circuit had upheld the Attorney General's *Matter of Soriano* decision. *See La Guerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998) *cert. denied*, 120 S.Ct. 1157 (2000).

On September 28, 2004, the Attorney General issued a final rule regarding § 212(c)'s application to cases post-*St. Cyr*. *See* 69 Fed. Reg. 57826-57835 (Sept. 28, 2004). The rule restricted *St. Cyr* to "certain" LPR's who pleaded guilty or nolo contendere to crimes

before April 1, 1997, but not all LPR's who had a settled expectation at the time of their pleas. Thus, the Federal Register evidences the Attorney General's attempt to apply *Soriano* as valid law despite its rejection in *St. Cyr* and almost all the Circuit Courts.

This Court found that preventing illegal retroactivity becomes particularly important in preventing "[t]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *St. Cyr* at 315-316 (Citations omitted). Here, the Court highlighted the "vulnerability" of non-citizens who are unable to participate in the political process and thereby are left without recourse but for their procedural rights of "reasonable reliance and settled expectations." *Id.* Consequently, this Court found protecting vulnerable "settled expectations" from retroactivity necessary as a check with which to balance power.

Thus, it makes sense to hold that an "ultra vires act ... renders that portion of the proceedings a 'legal nullity.'" *Molina-Camacho v. Ashcroft*, 393 F.3d 937, 941 (9th Cir. 2004).

Quite simply, if *Matter of Soriano* becomes a legal nullity due to its *ultra vires* nature, then Mr. Avila-Sanchez's 1998 deportation proceedings become a legal nullity with regards to his ineligibility to exercise his settled expectations to apply for relief under INA § 212(c).

To restore Mr. Avila-Sanchez's settled expectations recognized in *St. Cyr*, this Court should remand his deportation case to the EOIR to allow him to apply for relief under INA § 212(c), because his deportation case could never have become final if it constituted a legal nullity, and, if it did not become final, Mr. Avila-Sanchez would remain an LPR under INA § 101(a)(20) and 8 C.F.R. § 1.1(p).

B. St. Cyr Applies to Cases on Collateral Review of Deported Legal Permanent Residents with Settled Expectations whom the Attorney General Unlawfully Prohibited from Applying for Relief.

This Court has held that "the judgement whether a particular statute acts retroactively should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." *St. Cyr* at 321. "There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences [including discretionary relief under 212(c)]." *Id.* at 322. The reasonableness of an alien's decision to enter a plea agreement or to seek declaratory relief is what the holding in *St. Cyr* emphatically defends and aptly refers to as the "reasonable reliance and settled expectations" of those aliens who qualified for § 212(c) relief.

In *St. Cyr*, the INS, argued that "deportation proceedings (and the Attorney General's discretionary power to grant relief from deportation) are 'inherently prospective' and that, as a result, application of the law

of deportation can never have a retroactive effect." *Id.* at 324. In explicitly rejecting this argument, the Court held that the availability of § 212(c) implicates constitutional retroactivity concerns that "apply far beyond the confines of the criminal law" as they alter an alien's reasonable reliance on the availability of certain forms of relief at the time they entered plea agreements. *St. Cyr* at 324.

St. Cyr is broad enough that it applies to the reasonable reliance and settled expectations of all aliens on collateral review who got deported under the Attorney General's decision in *Soriano*. In Mr. Avila-Sanchez's case, the Attorney General argued that courts will not disturb final civil or criminal judgements on collateral review, even if the law applied at the time is later overturned. Attorney General's Brief at 11, *Avila-Sanchez v. Mukasey*, No. 06-70663 (9th Cir.). The Attorney General cites two cases in support of this argument: *Teague v. Lane*, 398 U.S. 288 (1989), and *Kleve v. Hill*, 243 F.3d 1149 (9th Cir. 2001), *cert. denied* 534 U.S. 948 (2001).

The Attorney General's misreads *Teague v. Lane*, because the Court actually ruled that *new rules* should not be applied retroactively to cases on collateral review, because it results in disparate treatment to similarly situated persons. Furthermore, the facts in *Teague* arose from a defendant who wanted to benefit from a new law that would allow him a new jury trial under the *Batson* Rule. Yet, Mr. Avila-Sanchez seeks 212(c) relief not to benefit from a new rule; instead, he seeks to benefit from the same rule that existed at the time his pleas prior to April 1, 1997—he wants to apply for a form of relief always available to him but illegally

withheld based on *Soriano*. Finally, unlike *Teague* where a prosecutor legally used all his preemptory challenges and the conviction became final under the law of the time, the Attorney General lacked the authority to retroactively repeal § 212(c). Thus, the Attorney General's illegal act moots the finality concerns present in *Teague*, because Congress intended that § 212(c) relief remain available to Mr. Avila-Sanchez—no change in law occurred as alleged by the Attorney General and as existed in *Teague*.

Also, *Kleve v. Hill* does not apply for two reasons. First, *Kleve* contains no issue of retroactivity that would have voided the judgement due to an impermissible act by one of the branches of government. Second, *Kleve* also involves a change in the law, *i.e.*, the elements needed to prove first and second degree conspiracy to commit murder. Again, no change in the law occurred in Mr. Avila-Sanchez's case, because Congress intended that § 212(c) relief remain available to Mr. Avila-Sanchez.

In summary, for persons like Mr. Avila-Sanchez, the enactment of AEDPA and IIRIRA did not change one's existing eligibility for § 212(c) relief. Instead, *St. Cyr*, "finally decided what [AEDPA and IIRIRA] had always meant and explained why [the Attorney General] ... had misinterpreted the will of the enacting Congress. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 (1994). Thus, *St. Cyr* established Mr. Avila's Sanchez remained eligible to apply for § 212(c) relief during his proceedings, because no change in the law occurred due to the Attorney General's misinterpretation of the law in *Soriano*.

C. *This Court's Decision in Fong Haw Tan v. Phelan Limits the Executive Branch's Interpretive Authority and Makes 8 C.F.R. § 1003.44(k)—that Extinguishes the Settled Expectations Recognized By St. Cyr—Ultra Vires and a Legal Nullity.*

In *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948), this Court recognized the principle that all aspects of the immigration laws should get liberally construed in favor of the alien:

> [D]eportation is a drastic measure and at times the equivalent of banishment or exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.

Id. at 10 (citation omitted). *See also INS v. Errico*, 385 U.S. 214, 225 (1966); *Woodby v. INS*, 385 U.S. 276, 285 (1966). "This principle has been widely invoked in deportation cases, and it requires the courts to interpret all aspects of the immigration laws ... liberally in favor of the alien." *Squires v. INS*, 689 F.2d 1276, 1280 (6th Cir. 1982).

As this Court has never overturned *Fong Haw Tan*, this principle should still bind the Executive Branch's interpretative authority.

The Regulations at 8 C.F.R. § 1003.44(k) extinguish the settled expectations of LPR's recognized as attaching at the time of their pleas by this Court and violate this principle for all LPR's that the Attorney General ordered deported or removed based upon the *ultra vires* interpretation in *Matter of Soriano*.

As the Attorney General's own *ultra vires* act of recognizing retroactive application of the laws absent clear Congressional mandate itself created the situation where LPR's first got denied the opportunity in deportation proceedings and/or removal proceedings to exercise their settled expectations, it seems the height of unfairness and injustice to deny persons wrongly denied the opportunity to exercise their settled expectations the right to exercise them at a later date.

If *Fong Haw Tan* binds the Executive Branch to resolving ambiguous issues in favor of the alien, the Executive Branch must allow LPR's denied the right to apply for relief under INA § 212(c) due to an *ultra vires* retroactive application a new opportunity to apply for relief rather than bar them based on a prior deportation, because this Court did not indicate that deportation or removal should extinguish the settled expectations recognized as attaching at the time of plea.

As noted above, the interpretive deference given under *Chevron* to the Executive Branch interpretations does not extend to interpretations that squarely conflict with Congressional intent and breach established doctrines of Legislative interpretation. "*Chevron* deference is predicated on the assumption that a statute's ambiguity constitutes an 'implicit delegation'

to the agency to interpret the statute." *Castro-Cortez v. INS*, 239 F.3d 1037, 1053 (9th Cir. 2001) (citing *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

Since the resolving ambiguities in the aliens' favor constitutes an established doctrine of legislative interpretation, Courts may give no deference to the Executive Branch's interpretations that unfavorably resolved the ambiguity of whether settled expectations to apply for relief against aliens whom it deported or removed became extinguished by the deportation or removal.

As the regulations at 8 C.F.R. § 1003.44(k) violate the interpretive principle in *Fong Haw Tan*, this Court should deem the regulations *ultra vires*.

D. Where the Executive Branch Acts Ultra Vires, an Alien Adversely Affected by such Ultra Vires Acts Suffers a Due Process Violation where Three Separate Administrative Courts take Simultaneous Jurisdiction over the Singular Issue of an Alien's Deportability instead of Deferring to Each Other and Creating an Orderly, Unified Process.

If the Attorney General's retroactive application of the law and extinguishing of settled expectations are ultra vires, then Mr. Avila-Sanchez due process rights got trampled by the fact that three separate administrative courts took simultaneous jurisdiction over the singular issue of Mr. Avila-Sanchez's deportability.

The Immigration Judge Bench book advises and requires Judge's to defer jurisdiction to the BIA before proceeding in on any case. "Once a Notice of Appeal is filed, jurisdiction 'vests' in the Board and you entirely lose jurisdiction. Therefore, you cannot make any substantive decision in the appealed case. Only the Board has authority over the case. [] Also, once the Board has assumed jurisdiction over a case, jurisdiction remains with the Board unless the Board remands the matter back to Immigration Court." IMMIGRATION JUDGE HANDBOOK (October 2001) at 120. Thus, Judge Nickerson in Lancaster should not have exercised jurisdiction over the ultimate issue of removability until the BIA had rendered a decision on his special motion to reopen deportation proceedings.

Also, in most analogous situations in a Judicial setting, the lower court will normally wait for a higher court to rule before exercising its jurisdiction and prejudicing a party prior to the higher court's ruling.

Further, the Immigration Judge Bench book advises and requires Judges to recognize that the Ninth Circuit forbids a Judge from conducting proceedings outside of the physical presence of the alien in deportation proceedings:

> It is also important to be aware that the United States Court of Appeals for the Ninth Circuit determined in 1989 that section 242(b) of the Act required that deportation hearings be conducted with the hearing participants in the physical presence of the Immigration Judge, and that "telephonic hearings by an Immigration Judge, absent consent of the parties, simply are not authorized by statute." *Purba v. INS*, 884 F.2d 516,

518 (9th Cir. 1989). This view has thus been incorporated into the statute at section 240(a)(2)(B) of the Act for purposes of removal proceedings.

Id. at 35.

In Mr. Avila-Sanchez' case, Judge Weil in El Centro erred by setting hearings and conducting proceedings with neither Mr. Avila-Sanchez nor his counsel present.

This Court has more than once expressed the importance of affording the proper protections to resident aliens. In *Galvan v. Press*, 347 US 522, 531 (1954), Justice Frankfurter remarked:

> Considering what it means to deport an alien who legally became a part of the American community, and the extent to which, since he is "a person" an alien has the same protection for his life, liberty and property under the Due Process Clause as is afforded to a citizen, deportation without permitting the alien to prove that he was unaware of the Communist Party's advocacy of violence strikes one with a sense of harsh incongruity. If due process bars Congress from enactments which shock the sense of fair play—which is the essence of due process—one is entitled to ask whether it is not beyond the power of Congress to deport an alien who was duped into joining the communist P particularly when his conduct antedated the enactment of the legislation under which his deportation is sought. And this is because deportation may ... deprive a man "of all that makes life worth living."

Assuming that the Attorney General's *ultra vires* acts meet the prejudice requirement due to Mr. Avila-Sanchez losing the right to apply for relief and retain

his LPR status, Mr. Avila-Sanchez suffered a due process violation, because he did not have a meaningful opportunity to be heard in the context of having three administrative courts exercise simultaneous jurisdiction over a singular issue.

Moreover, when determining the issue of whether a person may remain in the United States or suffer removal, Congress intended that jurisdiction must remain with one immigration Judge at a time. "An immigration judge shall conduct proceedings for decided the inadmissibility or deportability of an alien." INA § 240(a)(1); 8 U.S.C. § 1229a(a)(1). Had Congress intended that two or more immigration judges conduct concurrent proceedings, it could have written the statute to read "Immigration judges" rather than "*An* immigration judge."

When it started, this case presented a very simple issue of whether Mr. Avila-Sanchez remained eligible to apply for a § 212(c) waiver, and it evolved into a Kafkaesque nightmare, when it should have gone quickly on appeal to the Ninth Circuit for a determination of whether St. Cyr's holding that LPR's had a settled expectation at the time of their pleas became extinguished by the Attorney General's *ultra vires* actions. Ironically, the Ninth Circuit never meaningfully addressed this issue.

As Mr. Avila-Sanchez had a settled expectation of eligibility, he deserved a more uniform and orderly process to determine the merits of his claim.

VI. Conclusion

For the foregoing reasons, Mr. Avila-Sanchez requests this Court to grant this Petition for Writ of Certiorari.

Respectfully submitted,

Date: May 19, 2008

Carlos Vellanoweth
Counsel of Record

Date: May 19, 2008

John Wolfgang Gehart
Attorney for Petitioner

Date: May 19, 2008

Elena Yampolsky
Attorney for Petitioner

Date: May 19, 2008

Russell Marco Jauregui
Attorney for Petitioner

VII. APPENDIX

A. *Avila-Sanchez v. Mukasey*, 06-70663, Order Denying Petition for Rehearing and for Rehearing En Banc (Feb. 27, 2008)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-70663
Agency No. A36-649-343

ORDER DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC

OSCAR JAVIER AVILA-SANCHEZ,
Petitioner,
v.
MICHAEL B. MUKASEY, Attorney General,
Respondent.

Before: FERNANDEZ and WARDLAW, Circuit Judges, and COLLINS* District Judge.

The panel has unanimously voted to deny Avila-Sanchez's petition for rehearing. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing and the petition for rehearing en banc are
DENIED.

* The Honorable Raner C. Collins, United States District Judge for the District of Arizona, sitting by designation.

B. *Avila-Sanchez v. Mukasey*, 509 F.3d 1037 (9th Cir. 2007)

United States Court of Appeals, Ninth Circuit.

Oscar Javier AVILA-SANCHEZ, Petitioner,

v.

Michael B. MUKASEY,* Attorney General, Respondent.

No. 06-70663.

Submitted Oct. 15, 2007.**

Filed Dec. 3, 2007.

Background: Alien, a native of Mexico, petitioned for review an order of the Board of Immigration Appeals (BIA), denying motion to reopen removal proceedings to obtain waiver of inadmissibility.

Holdings: The Court of Appeals, Fernandez, Circuit Judge, held that:
(1) alien was not entitled to collaterally attack previous removal order;
(2) immigration regulation did not violate equal protection; and

(3) fact that alien's hearing on motion to reopen removal proceedings was before a different IJ than his subsequent removal hearing after his illegal reentry did not violate due process.

Petition denied.

*1038 Carlos Vellanoweth, John Wolfgang Gehart, Elena Yampolsky, and Russell Marco Jauregui, Vellanoweth & Gehart, LLP, Los Angeles, CA, for the petitioner.

Edward J. Duffy, U.S. Department of Justice, Office of Immigration Litigation, Washington, DC, for the respondent.

Petition to Review an Order of the Board of Immigration Appeals. Agency No. A36-649-343.

Before: FERDINAND F. FERNANDEZ and KIM McLANE WARDLAW, Circuit Judges, and RANER C. COLLINS,*** District Judge.

FERNANDEZ, Circuit Judge:
Oscar Javier Avila-Sanchez, a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals' order denying his special motion to reopen so that he could apply for a waiver of inadmissibility pursuant to former 8 U.S.C. § 1182(c) (1994).FN1 The BIA determined that due to the fact of Avila's prior deportation and subsequent illegal reentry, he was not entitled to relief. In addition, it

refused to allow him to collaterally attack prior proceedings. We deny the petition.

BACKGROUND

Avila was a lawful permanent resident, who first entered the country in 1980. In July 1994, Avila pled guilty and was convicted of possession of a controlled substance (heroin), pursuant to California Health and Safety Code § 11350. In November 1996, the former Immigration and Naturalization Service issued an Order to Show Cause charging Avila with a controlled substance violation, and placed him in deportation proceedings. [First Proceeding]. In those proceedings, the Immigration Judge found Avila deportable as charged, ineligible for relief under § 1182(c), and ineligible for cancellation of removal.

Avila filed a timely motion for reconsideration, in which he requested a waiver of inadmissibility under § 1182(c).FN2 The BIA ***1039*** applied the 1996 version of § 1182(c) and on February 5, 1998, denied the motion. It held that *In re Soriano,* 21 I. & N. Dec. 516 (BIA 1996) was dispositive, and that Avila was statutorily ineligible for relief as an " 'alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D) [8 U.S.C. § 1251(a)(2)(A)(iii), (B), (C), or (D)], or any offense covered by section 241(a)(2)(A)(ii) [8 U.S.C. § 1251(a)(2)(A)(ii)] for which both predicate offenses are covered by section 241(a)(2)(A)(i) [8 U.S.C. § 1251(a)(2)(A)(i)].' " FN3 Avila was represented by counsel, but neither filed a petition for review or

habeas corpus from that order, nor asked for a stay of deportation to challenge the order of removal. He was deported on February 20, 1998.

Avila illegally returned to the United States in July 1998. In April 2005, he was stopped for suspicion of driving under the influence and detained. The Department of Homeland Security requested that he remain in custody, and on April 29, 2005, issued a Notice to Appear. [Second Proceeding]. The Notice to Appear charged that Avila was not a citizen or national of the United States and that he was removable for entering the United States without inspection after he had been previously removed. Avila admitted that he was removable as charged, but waited to collaterally attack his prior removal. On June 28, 2005, the IJ ordered him removed.

However, on April 20, 2005, Avila had filed with the BIA an unopposed special motion to reopen the First Proceeding-his 1998 removal proceeding-to seek § 1182(c) relief under 8 C.F.R. § 1003.44. In that motion, Avila failed to advise the BIA that he had been deported previously pursuant to a final order of removal, which made him ineligible for special reopening. Based on that incomplete information, the BIA reopened the First Proceeding and remanded the case on July 7, 2005.

The day after the BIA reopened the First Proceeding, Avila appealed the IJ's June 2005 order of removal in the Second Proceeding to the BIA. Avila then requested that the BIA consolidate his removal proceeding (the

Second Proceeding) with the motion to reopen his First Proceeding. On August 11, 2005, the IJ in the First Proceeding requested that the BIA reconsider its decision to reopen the First Proceeding because Avila's departure and illegal reentry made him ineligible to have his case reopened under 8 C.F.R. § 1003.44.

In September 2005, the BIA dismissed Avila's appeal of the June 28, 2005, removal order in the Second Proceeding. He moved the BIA to reconsider that decision and renewed his request to consolidate the removal case (Second Proceeding) with the special motion to reopen (First Proceeding). On January 23, 2006, the BIA issued orders in both proceedings. The first order denied Avila's motion for reconsideration of its decision denying his appeal from the June 2005 order of removal in the Second Proceeding. The second order held that the BIA had erred in granting Avila's motion to reopen the First Proceeding. The BIA pointed out that Avila was previously deported and had illegally reentered the United States, and was, therefore, ineligible for reopening. *See* 8 C.F.R. 1003.44(k)(2). It, therefore, vacated its July 2005 reopening decision, reinstated Avila's motion to reopen, and denied it. This petition for review followed.

STANDARD OF REVIEW

We review the BIA's decision to deny a motion to reopen for abuse of discretion.***1040** *Mohammed v. Gonzales*, 400 F.3d 785, 791 (9th Cir.2005). We review constitutional and legal issues de novo. *Ram v. INS*, 243

F.3d 510, 516-17 (9th Cir.2001); *Mohammed*, 400 F.3d at 791-92. However, we do accord appropriate deference to the BIA. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 423-25, 119 S.Ct. 1439, 1445-46, 143 L.Ed.2d 590 (1999).

DISCUSSION

Avila claims that the BIA erred when it denied his petition to reopen the First Proceeding so that he could challenge its decision of February 5, 1998, that he was not entitled to 1182(c) relief, and so that he could apply for that relief. At the time of the February 5, 1998, decision, the BIA had relied upon its prior determination FN4 that the AEDPA amendments to § 1182(c) applied to people who had pled guilty to offenses before it was enacted. As is well known, the courts later determined that the contrary was true. *See INS v. St. Cyr*, 533 U.S. 289, 326, 121 S.Ct. 2271, 2293, 150 L.Ed.2d 347 (2001); *see also Magana-Pizano v. INS*, 200 F.3d 603, 611-13 (9th Cir.1999).

Thereafter, a regulation was adopted to provide for a special motion to reopen cases where relief had been erroneously denied under the old regime. *See* 8 C.F.R. § 1003.44(a)-(c). However, that regulation specifically provides that: "This section does not apply to: ... (2) Aliens issued a final order of deportation or removal who then illegally returned to the United States." *Id.* § 1003.44(k)(2). The BIA interpreted that regulation to preclude reopening of the First Proceeding. The BIA did so because Avila had undoubtedly been deported while he was subject to a final order of deportation issued February 5, 1998, and had unquestionably

returned illegally. On its face, the BIA's decision was not erroneous.

However, Avila argues the BIA erred because the order of deportation in the First Proceeding was illegal, and could not, therefore, have been the basis for his removal from the United States. Similarly, he asserts that he should have been able to collaterally attack the result of the First Proceeding. He is wrong.

As we have explained before, the mere fact that the BIA made an interpretation error was insufficient to make its order "unlawful." *See Alvarenga-Villalobos v. Ashcroft,* 271 F.3d 1169, 1172-73 (9th Cir.2001). In that case, the alien had been deported after having been denied § 1182(c) relief, but returned illegally. *Id.* at 1171. He asserted that because the original determination was erroneous, his deportation was unlawful. *Id.* We rejected that argument and pointed out that at the time of his deportation, the BIA's action was in accord with the rules that then existed and those were not overturned until over two years later. *Id.* at 1172. As we stated:

Alvarenga contends that [the provision in question] does not apply to him because the statute applies only to lawful removal orders. However, we need not resolve this issue, because, as we have explained, Alvarenga's deportation order was perfectly lawful under the law at the time he was deported. "[I]t has long been established that a final civil judgment entered under a given rule of law may withstand subsequent judicial change in that rule."

Id. at 1173. For all practical purposes, this case is the same.FN5 Thus, Avila's argument*1041 about "lawfulness" cannot save his position regarding the reopening of the First Proceeding or, for that matter, allowance of a collateral attack on the First Proceeding results.

But, argues Avila, the regulation violates equal protection principles because the treatment it accords to removed aliens differs from and is less favorable than the treatment accorded to those who have not yet been removed. However, in *Alvarenga-Villalobos* we disposed of a similar claim regarding the distinction between classes of aliens applying for § 1182(c) relief. As we said: "Distinctions between different classes of aliens in the immigration context are subject to rational basis review and must be upheld if they are rationally related to a legitimate government purpose." *Id.* at 1174. And, we held: "The government has a legitimate interest in discouraging aliens who have already been deported from illegally reentering, and this distinction is rationally related to that purpose." *Id.* Avila's claim lacks puissance.

Avila's due process assertions fare no better. His claim that the regulation violates due process is simply an allotrope of his other attacks upon it, and has as much effect. *See id.* at 1173-74. His ululation about the fact that the post-reentry portion of the First Proceeding was before one judge, while the Second Proceeding was before a different judge is otiose. Any awkwardness was largely due to his own

omissions.FN6 In any event, even if there were some error, the First Proceeding and the Second Proceeding were both before the BIA when it issued its ultimate orders on January 23, 2006, and Avila has not demonstrated any prejudice. *See Larita-Martinez v. INS*, 220 F.3d 1092, 1095 (9th Cir.2000).

CONCLUSION

Avila was removed in February 1998 because of his criminal history. He returned illegally in 1998. When stopped in 2005 for suspicion of driving under the influence and detained, he sought to reopen proceedings and to attack the prior proceeding. He was ultimately denied that relief, and was again ordered removed. He, with much febrile hyperbole, claims that denying him the right to reopen or collaterally attack the prior proceedings violates his constitutional rights. We disagree. The provisions of 8 C.F.R. § 1003.44(k)(2) are constitutional and were not improperly applied to Avila. Nor did the BIA err when it refused to allow a collateral attack on the prior proceeding.

Petition DENIED.

FN* Michael B. Mukasey is substituted for his predecessor, Alberto R. Gonzales, as Attorney General of the United States. Fed. R.App. P. 43(c)(2).

FN** The panel unanimously finds this case suitable for decision without oral argument. Fed. R.App. P. 34(a)(2).

FN*** The Honorable Raner C. Collins, United States District Judge for the District of Arizona, sitting by designation.

FN1. This is also often referred to as the Immigration and Nationality Act § 212(c).

FN2. At the time that Avila pled guilty, 8 U.S.C. § 1182(c) read in pertinent part: "The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years." 8 U.S.C. § 1182(c) (1994).

FN3. This was due to a change in the provisions of § 1182(c) made by the Antiterrorism and Effective Death Penalty Act, Pub.L. No. 104-132, 110 Stat. 1214 (1996), which became effective April 24, 1996.

FN4. *See In re Soriano*, 21 I. & N. Dec. at 540.

FN5. That the order of deportation for Avila came just under two years earlier, rather than over two years earlier, is of no significance.

FN6. When Avila asked the BIA to reopen the First Proceeding, he did not bother mentioning that he had been deported and had then reentered the United States without inspection. Also, when he asked the IJ who was hearing the mistakenly reopened First Proceeding to transfer the matter to the IJ who was

hearing the Second Proceeding, he did not bother mentioning that the Second Proceeding had already been decided by that IJ and was on appeal to the BIA.

C. Matter of Avila-Sanchez, A # 36-649-343 (BIA 1/23/2006) (Reconsideration in Removal Proceedings)

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A36 649 343 - Lancaster

In re: OSCAR JAVIER AVILA-SANCHEZ

IN REMOVAL PROCEEDINGS

MOTION

Date: JAN 23, 2006

ON BEHALF OF RESPONDENT: Carlos Vellanoweth, Esquire
ON BEHALF OF DHS: Sandra J. Santos, Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Reconsideration

This matter was last before us on September 28, 2005, when we dismissed the respondent's appeal of the Immigration Judge's decision finding the respondent removable from the United States and ineligible for any form of relief from removal. On October 12, 2005, the respondent filed a timely motion to reconsider. The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) has filed a brief in opposition to the respondent's motion. The respondent's motion will be denied.

A motion to reconsider shall specify the errors of fact or law in the prior Board decision and shall be supported by pertinent authority. *See* 8 C.F.R. § 1003.2(b)(1). We have reviewed the contentions raised in the respondent's motion, but find that our previous decision in these proceedings was correct. We find no error in our previous decision affirming the Immigration Judge's conclusion that the respondent is removable as charged in the Notice to Appear (Form 1-862) and ineligible for any form of relief from removal, including a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). The record reflects that the respondent was previously issued a final order of deportation and that he was deported to Mexico on February 20, 1998. Upon his deportation, the respondent's lawful permanent resident status was terminated and therefore, the respondent may not now seek a waiver of inadmissibility under section 212(c) of the Act in removal proceedings, inasmuch as 212(c) relief is only

available to persons having lawful permanent resident status. *See* 8 U.S.C. § 1182(c); *Matter of Cerna,* 20 I &N Dec. 399 (BIA 1991).

Further more, to the extent that the respondent seeks to collaterally attack his prior deportation order on the basis that the law has changed subsequent to the issuance of his prior deportation order, we note that the United States Court of Appeals for the Ninth Circuit , the jurisdiction in which this case arises, issued a decision *inAlvarenga-Villalobos v. Ashcroft,* 271 F.3d 1169 (9th Cir. 2001), in which the Court declined to apply a new legal precedent on collateral review such that an alien's prior order of deportation order would be retroactively invalidated. Specifically, the Ninth Circuit declined to retroactively apply the Ninth Circuit's decision in *Magana-Pizano v. INS,* 200 F.3d 603 (9th Cir. 1999), which permitted certain aliens to seek section 212(c) relief despite the passage of section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104- 132, 110 Stat. 1214 ("AEDPA"), on collateral review of an alien's prior deportation order. Moreover, we note that even if section 212(c) relief was available to the respondent to waive his convictions that occurred prior to the repeal of section 2I2(c) by the IIIegal Immigration Reform and Immigration Responsibility Act of 1996, Division C of Pub. L. No. 104- 208, 110 Stat. 3009-546, 3009-575 ("IIRIRA"), we find that the respondent has failed to establish that he would not remain removable from the United States for his post-IIRIRA convictions, including his 2003 conviction for Battery in violation of section 242 of the California Penal Code. *See* 8 C.F.R. §

1212.3(h)(3). *See United States v. Gonzalez-Valerio*, 342 F.3d 1051 (9th Cir. 2003). Lastly, we decline to consolidate the respondent's deportation and removal proceedings, inasmuch as the respondent has failed to establish eligibility for any form of relief. Accordingly, the respondent's motion to reconsider is denied.

/s
For the Board

D. Matter of Avila-Sanchez, A # 36-649-343 (BIA 1/23/2006) (212(c) Waiver in Deportation Proceedings)

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A36 649 343 - El Centro

In re: OSCAR JAVIER AVILA-SANCHEZ

IN DEPORTATION PROCEEDINGS

CERTIFICATION

Date: JAN 23, 2006

ON BEHALF OF RESPONDENT: Carlos Vellanoweth, Esquire
ON BEHALF OF DHS: Sandra J. Santos, Assistant Chief Counsel

CHARGE:

ORDER: Sec. 241(a)(2)(B)(i), I&N Act [8 U.S.C. § 1251(a)(2)(B)(i)] - Convicted of controlled substance violation

APPLICATION: Waiver of Inadmissibility under section 212(c)

This matter was last before us on July 7, 2005 when we granted the respondent's motion to reopen and remanded the record to the Immigration Judge to consider the respondent's application for a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). On August 11, 2005, the Immigration Judge certified this case to the Board. The Immigration Judge asks that the Board reconsider its order reopening this matter, as it appears that the respondent is ineligible for a wavier of inadmissibility under section 212(c) of the Act. On November 9, 2005, the Department of Homeland Security filed a motion arguing that the Board erred in granting the respondent's motion to reopen deportation proceedings in order to pursue 212(c) relief. The record reflects that the respondent was previously issued a final order of deportation and that he was deported to Mexico on February 20, 1998. Subsequent to his deportation, the respondent illegally reentered the United States.

We have reexamined the respondent's motion in light of the statements contained in the Immigration Judge's certification request and the evidence submitted by the

DHS to the Board. We find that we erred in granting the respondent's motion to reopen. Inasmuch as the respondent was previously deported and illegally reentered the United States, we find that the respondent is ineligible for a waiver of inadmissibility under section 212(c) of the Act. The regulation at 8 C.F.R. § 1003.44(k)(2) specifically provides that the regulation authorizing reopening to apply for 212(c) relief does not apply to "[a]liens issued a final order of deportation or removal who then illegally returned to the United States." *See also* 8 C.F.R. § 1003.44(k)(3); 8 C.F.R. § 1003.2(d). Accordingly, the following orders will be entered.

ORDER: The Board's July 7, 2005, decision is vacated.
FURTHER ORDER: The respondent's April 20, 2005, motion to reopen is reinstated.
FURTHER ORDER: The respondent's motion to reopen is denied.

/s
FOR THE BOARD

E. 8 C.F.R. § 1003.44

8 C.F.R. § 1003.44 Special motion to seek section 212(c) relief for aliens who pleaded guilty or nolo contendere to certain crimes before April 1, 1997. (Revised effective 10/28/04; 69 FR 57826)

(a) Standard for adjudication. This section applies to certain aliens who formerly were lawful permanent residents, who are subject to an administratively final

order of deportation or removal, and who are eligible to apply for relief under former section 212(c) of the Act and 8 CFR 1212.3 with respect to convictions obtained by plea agreements reached prior to a verdict at trial prior to April 1, 1997. A special motion to seek relief under section 212(c) of the Act will be adjudicated under the standards of this section and 8 CFR 1212.3. This section is not applicable with respect to any conviction entered after trial.

(b) General eligibility. The alien has the burden of establishing eligibility for relief, including the date on which the alien and the prosecution agreed on the plea of guilt or nolo contendere. Generally, a special motion under this section to seek section 212(c) relief must establish that the alien:

(1) Was a lawful permanent resident and is now subject to a final order of deportation or removal;

(2) Agreed to plead guilty or nolo contendere to an offense rendering the alien deportable or removable, pursuant to a plea agreement made before April 1, 1997;

(3) Had seven consecutive years of lawful unrelinquished domicile in the United States prior to the date of the final administrative order of deportation or removal; and

(4) Is otherwise eligible to apply for section 212(c) relief under the standards that were in effect at the time the alien's plea was made, regardless of when the plea was entered by the court.

(c) Aggravated felony definition. For purposes of eligibility to apply for section 212(c) relief under this

section and 8 CFR 1212.3, the definition of aggravated felony in section 101(a)(43) of the Act is that in effect at the time the special motion or the application for section 212(c) relief is adjudicated under this section. An alien shall be deemed to be ineligible for section 212(c) relief if he or she has been charged and found deportable or removable on the basis of a crime that is an aggravated felony, except as provided in 8 CFR 1212.3(f)(4).

(d) Effect of prior denial of section 212(c) relief. A motion under this section will not be granted with respect to any conviction where an alien has previously been denied section 212(c) relief by an immigration judge or by the Board on discretionary grounds.

(e) Scope of proceedings. Proceedings shall be reopened under this section solely for the purpose of adjudicating the application for section 212(c) relief, but if the immigration judge or the Board grants a motion by the alien to reopen the proceedings on other applicable grounds under 8 CFR 1003.2 or 8 CFR 1003.23 of this chapter, all issues encompassed within the reopened proceedings may be considered together, as appropriate.

(f) Procedure for filing a special motion to seek section 212(c) relief. An eligible alien shall file a special motion to seek section 212(c) relief with the immigration judge or the Board, whichever last held jurisdiction over the case. An eligible alien must submit a copy of the Form I-191 application, and supporting documents, with the special motion. The motion must contain the notation

"special motion to seek section 212(c) relief." The Department of Homeland Security (DHS) shall have 45 days from the date of filing of the special motion to respond. In the event the DHS does not respond to the motion, the DHS retains the right in the proceedings to contest any and all issues raised.

(g) Relationship to motions to reopen or reconsider on other grounds.

(1) Other pending motions to reopen or reconsider. An alien who has previously filed a motion to reopen or reconsider that is still pending before an immigration judge or the Board, other than a motion for section 212(c) relief, must file a separate special motion to seek section 212(c) relief pursuant to this section. The new motion shall specify any other motions currently pending before an immigration judge or the Board. An alien who has previously filed a motion to reopen under 8 CFR 1003.2 or 1003.23 based on INS v. St. Cyr is not required to file a new special motion under this section, but he or she may supplement the previous motion if it is still pending. Any motion for section 212(c) relief described in this section pending before the Board or an immigration judge on the effective date of this rule that would be barred by the time or number limitations on motions shall be deemed to be a motion filed pursuant to this section, and shall not count against the number restrictions for other motions to reopen

(2) Motions previously filed pursuant to prior provision. If an alien previously filed a motion to

apply for section 212(c) relief with an immigration judge or the Board pursuant to the prior provisions of this section, as in effect before October 28, 2004, and the motion is still pending, the motion will be adjudicated pursuant to the standards of this section, both as revised and as previously in effect, and the alien does not need to file a new special motion pursuant to paragraph (g)(1) of this section. However, if a motion filed under the prior provisions of this section was denied because the alien did not satisfy the req uirements contained therein, the alien must file a new special motion pursuant to this section, if eligible, in order to apply for section 212(c) relief based on the requirements established in this section.

(3) Effect of a prior denial of a motion to reopen or motion to reconsider filed after the St. Cyr decision. A motion under this section will not be granted where an alien has previously submitted a motion to reopen or motion to reconsider based on the St. Cyr decision and that motion was denied by an immigration judge or the Board (except on account of time or number limitations for such motions).

(4) Limitations for motions. The filing of a special motion under this section has no effect on the time and number limitations for motions to reopen or reconsider that may be filed on grounds unrelated to section 212(c)

(h) Deadline to file a special motion to seek section 212(c) relief under this section. An alien subject to a final

administrative order of deportation or removal must file a special motion to seek section 212(c) relief on or before April 26, 2005. An eligible alien may file one special motion to seek section 212(c) relief under this section.

(i) Fees. No filing fee is required at the time the alien files a special motion to seek section 212(c) relief under this section. However, if the special motion is granted, and the alien has not previously filed an application for section 212(c) relief, the alien will be required to submit the appropriate fee receipt at the time the alien files the Form I-191 with the immigration court.

(j) Remands of appeals. If the Board has jurisdiction and grants the motion to apply for section 212(c) relief pursuant to this section, it shall remand the case to the immigration judge solely for adjudication of the section 212(c) application.

(k) Limitations on eligibility under this section. This section does not apply to:

(1) Aliens who have departed the United States and are currently outside the United States;

(2) Aliens issued a final order of deportation or removal who then illegally returned to the United States; or

(3) Aliens who have not been admitted or paroled.